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No. 362

In the Supreme Court of the United States

OCTOBER TERM, 1920

LIGGETT & MYERS TOBACCO COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF HABEAS CORPUS TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

U. S. GOVERNMENT PRINTING OFFICE

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*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

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**BRIEF FOR THE UNITED STATES**

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## **OPINION**

The opinion of the Court of Claims (R. 41-46) is reported at 61 C. Cls. 693.

## **JURISDICTION**

The judgment of the Court of Claims was entered on February 15, 1926. (R. 46.) The petition for writ of certiorari was filed May 3, 1926 (R. 47), and was granted October 11, 1926 (R. 48). The jurisdiction of this Court rests on the provisions of the Act of February 13, 1925. (Chap. 229, 43 Stat. 936.)

**THE QUESTION**

The question presented is whether the United States should pay, for tobacco products obtained by the United States from the petitioner, the value of the tobacco products at the date they were delivered to the United States, or that value plus interest thereon from the date of delivery to the date of payment, and this, in turn, depends upon whether the tobacco products were obtained by the United States through the exercise of the power of eminent domain (or possibly under a contract to pay just compensation in the constitutional sense) or under a contract with the petitioner to pay the reasonable value at the date of delivery, allowance of interest on which is forbidden by Section 177, Judicial Code.

**STATEMENT**

On August 26, 1918, Navy Order No. N-4128 was issued out of the Bureau of Supplies and Accounts of the Navy Department, addressed to petitioner. (R. 29.) Said order provided as follows (R. 29-30):

1. Pursuant to the provisions of the Acts of Congress, Naval Appropriation Act approved March 4, 1917, and the Urgent Deficiency Act approved June 15, 1917 (quoted in part on reverse hereof), and acting under the direction of the President of the United States, an order is hereby placed with you under the conditions stated in subparagraph (b) (subparagraph (a) is elimi-

nated), to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory, and no commercial orders shall be allowed by you to interfere with the delivery herein provided for.

(a) The price herein stated has been determined as reasonable and as just compensation for the material to be delivered; payment will be made accordingly. If the amount is not satisfactory, you will be paid 75 per centum of such amount, and further recourse may be had in the manner prescribed in the above-cited acts. Please indicate conditions under which you accept this order by filling in and signing certificate below, returning original copy of order. If you state the price fixed as reasonable is not satisfactory, 75 per cent only of the unit price will be paid. If payment in full is accepted it will be considered as constituting a formal release of all claims arising under this order.

(b) As it is impracticable to now determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be subject to later determination. You are assured of a reasonable profit under this order; and as an advance payment you will be paid the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount

finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be. The unit price stated herein will not prejudice any future price determination or be considered as a precedent in determining such increases or decreases as may be later decided upon as proper.

(c) The order must be accepted and filled in any event, and if placed in accordance with subparagraph (a), you are only required to indicate below whether the price stated and fixed is satisfactory or is not satisfactory. If not satisfactory, a separate letter of comment and qualification must accompany the original order that is to be signed by you and returned. If order is placed under subparagraph (b), original is to be signed and returned. The duplicate copy may be retained by you in either case.

Thereafter followed certain paragraphs with reference to deliveries and bills and a statement of the number and kind of products required, together with a list of the provisional prices for the tobacco products mentioned in said order. (R. 31, 32.) There was also contained among these provisions the following (R. 31):

5. The conditions appearing on the reverse side hereon are made a part of this order.

After an enumeration of certain quantities of certain brands of tobacco products, this provision occurred (R. 31):

These quantities are the estimated Navy requirements for period to 1 December, 1918. The Navy does not guarantee *to purchase* the above-stated quantities and reserves the right to increase or decrease these quantities in conformity with the requirements of the Navy during the above-stated period. Shipment will be made only on receipt of an order from the Officer-in-Charge, Provisions & Clothing Depot, based on this Navy Order. (*Italics ours.*)

At the end of the order the following endorsement appeared (R. 32):

The above order is accepted subject to the conditions in subparagraph b above.

LIGGETT & MYERS TOBACCO Co.,  
By C. W. Toms,  
*Vice President.*

On the reverse side of this printed order appeared extracts from said Acts of March 4, 1917, and June 15, 1917, following which was printed certain conditions. (R. 33-34.) Among other things it was provided that the articles furnished or services performed under the order must conform in all respects to the requirements of the specifications as indicated thereon, the conditions and deliveries as contained in the order, and that unless the specifications prescribed to the contrary—

all workmanship and materials entering into the manufacture or construction of the material delivered must be of the very best quality and manufacture. (R. 34.)



It was also provided that the material and service should be subject to inspection by the Government, and—

will not be accepted unless conforming in all respects to the requirements of the specifications (R. 35)—

and if the specifications directed inspection before shipment, the shipment must not be made until the material had been inspected and orders given for shipment by the inspecting officer. (R. 35.) Then followed certain conditions with reference to payments, patent rights, consignments, shipping memoranda, deliveries, responsibility prior to acceptance, deliveries in yard hours, and rejected articles (R. 35, 36), and petitioner was specifically advised that these instructions must be carefully followed and that if they were not understood they should be referred to the Bureau of Supplies and Accounts for instructions (R. 36).

The pertinent provisions of the Act of March 4, 1917 (Chap. 180, 39 Stat. 1168, 1193), and of the Act of June 15, 1917 (Chap. 29, 40 Stat. 182, 183), are printed in an appendix to this brief. There were three modifications of the order, two increasing the amounts, and each was signed by the Paymaster General of the Navy. One dated September 9, 1918, was to the effect that any orders issued by the Quartermaster of the Marine Corps at Washington for the brands of tobacco specified in the original order were to be executed and billed at the prices

stated thereon. (R. 37.) Another modification was made on October 14, 1918, for certain additional products (R. 37), and another modification on November 22, 1918, for additional quantities of tobacco products to be shipped when ordered by the officer in charge of the Fleet Supply Base at South Brooklyn (R. 37, 38). Each of these modifications was accepted by petitioner by an endorsement thereon. (R. 37, 38.) The petitioner delivered large quantities of tobacco products under these orders between September 9, 1918, and November 23, 1918, for which it billed the Government in the aggregate sum of \$483,504.30, which the Court of Claims finds as a fact was the fair and reasonable value of said products. The Government paid upon the basis of the provisional price the sum of \$423,893.96, making a difference between the fair value and the price paid of the sum of \$59,610.34 (R. 38), for which sum the Court of Claims rendered judgment (R. 47).

By a letter received by petitioner February 20, 1919, the Navy Department cancelled the original order as modified and no further orders or deliveries were made after that. (R. 38, 39.)

By a letter dated December 4, 1920, the Bureau of Supplies and Accounts attempted to modify this order by applying the terms and conditions of subparagraph (a) thereof and then fixed a final price as stated in said letter for each of the products so previously delivered by petitioner. It was also stated that these prices were fixed upon the basis of

the Federal Trade Commission's report, and with the concurrence of the Army, the Marine Corps, and the Navy, and that upon the basis of the prices so fixed the petitioner had been overpaid by the provisional prices in the sum of \$4,968.44, which the letter requested be returned to the Government. (R. 39, 40.) The letter further stated that if petitioner decided that these prices as just compensation were not satisfactory, that claim should be made for the additional amount desired. (R. 40.) The petitioner on December 7, 1920, advised the Paymaster General of the Navy that the settlement proposed was unsatisfactory and could not be accepted. (R. 40.)

Upon these facts the Court of Claims concluded that the transaction here involved was a contract and not a taking of the property of petitioner by the Government under the power of eminent domain. It also held that the petitioner had not been paid the reasonable value of the products taken, to which sum it was entitled under the contract, and therefore the court rendered judgment for the difference between such reasonable value and the amount already paid. The court declined to allow any sum for interest or the equivalent thereof, holding that, as the transaction was a contract, Section 177 of the Judicial Code, which prohibited the allowance of interest upon any claim in the Court of Claims prior to judgment thereon in the absence of a contract or a statute expressly

stipulating for its payment, prevented the recovery of any interest or its equivalent in this case.

#### SUMMARY OF ARGUMENT

The transaction was a contract and not a requisition of property. The order itself shows that it was intended as a contract. There is no power in the Government to requisition property not in existence. The Paymaster General of the Navy had no authority to requisition property. The transaction was a contract which agreed to pay the fair value of the property delivered and to such sum no interest can be allowed.

#### ARGUMENT

##### Preliminary Statement

The petitioner contends that the transaction here involved was the commandeering or requisition of its property under the Acts of March 4, 1917, and June 15, 1917. It therefore urges that it is entitled to just compensation in accordance with the principles laid down by this Court in the case of *Seaboard Air Line Railway Co. v. United States*, 261 U. S. 299, and *Brooks-Scanlon Corporation v. United States*, 265 U. S. 106.

The Court of Claims has already allowed a recovery of the difference between the market value of the tobacco products at the time delivered and the amount which has previously been paid by the Government. The propriety of this action is not

questioned, but the petitioner contends that the court should also have allowed as part of just compensation a sum equal to interest upon this amount, for which the Court of Claims rendered judgment, from the date of the delivery of the tobacco products down to the date of payment. The Government contends that the Court of Claims properly held that the transaction here involved was not a commandeering or requisition of property but was a contract; that the contract was not one expressly stipulating for the payment of interest, and that in the absence of such express stipulation the provisions of Section 177 of the Judicial Code prohibit the allowance of interest upon such claim either directly or indirectly.

THE TRANSACTION WAS NOT A REQUISITION, BUT A  
CONTRACT

*The terms of the order as well as the actions of the parties thereunder show that the transaction was a contract*

The order was issued by the Paymaster General of the Navy and states that pursuant to said Acts of March 4, 1917, and June 15, 1917, and acting under the direction of the President—

an order is hereby placed with you under the conditions stated in subparagraph (b)  
\* \* \* to furnish and deliver material needed by the Navy as listed below. Compliance with this order is obligatory, and no commercial orders shall be allowed by you to interfere with the delivery herein provided for. (R. 29, 30.)

While the form of order used is not conclusive, to say the least it must be persuasive. The words used are not those of command or requirement. Where it states that an order is placed it is but using the words of an ordinary commercial transaction. Where it states that the order is placed "to furnish and deliver" again we have the words of the ordinary commercial transaction of purchase and sale. Had the transaction been a commandeering, it would have been the immediate taking possession of property then on hand, and need to have consisted of no more than a mere notice that the Government then and there took the property; not that it placed an order with the company to furnish and deliver materials.

Petitioner seeks some solace in the words to the effect that the compliance with the order is obligatory and no commercial order shall be allowed to interfere with the delivery therein provided for. These words are but a repetition of the words of the statute, and an analysis of the statute will make their meaning clear.

In considering the statute it should be borne in mind that commandeering or requisitioning of property is essentially a proceeding *in rem*. *Duckett & Co. v. United States*, 266 U. S. 149, 151. This is quite well stated in an opinion rendered by Mr. Justice Sanford, then District Judge, "*In re Condemnation Suits by the United States*" (234 Fed. 443), where at p. 445 it is said:

Such condemnation proceedings are generally recognized as being essentially proceedings in rem.

To the same effect is the decision by the Court of Appeals of the District of Columbia in *District of Columbia v. Jones*, 38 App. D. C. 560, 564. Many State decisions are to the same effect. The reason for this conclusion is very apparent. When the Government or one acting under its authority exercises the power of eminent domain, it immediately takes the property which is then in existence, and the property must be in existence in order that its taking may have something upon which to operate. The title then passes to the Government. The exercise of the power operates upon the thing taken and not upon the owner.

While it is not necessary to go to such extent, it may well be doubted whether the Government had any authority or power either through its legislative, executive, or judicial branches to compel any person or corporation to operate its plant and produce articles which it desired. What would be the machinery to enforce the execution of such order? How could its specific performance be compelled?

In enacting the statutes here involved, it is very apparent that Congress must have had these things in mind, because these statutes, especially the Act of June 15, 1917, which is the broadest, contemplated three things:

1. That the Government might requisition or commandeer property then in existence.

2. That the Government might place an order for the production or manufacture of products not then in existence, but which it would need; and that compliance with the same would be obligatory so far as commercial orders were concerned and should take preference over such orders. In this way those with whom the Government placed these orders would be relieved of actions for damages by commercial contractors. The use of the word "obligatory" in the same sentence with the reference to other commercial orders clearly indicates this purpose and intent.

3. If the manufacturer did not accept the Government's order, then the Government could exercise its power of eminent domain and take the plant or property or the use thereof and operate the same for the purpose of producing the articles which it needed and which the manufacturer declined to produce. Such taking of a plant or factory would have been an exercise of the power of eminent domain and would have operated upon property then in existence.

The foregoing analysis of this statute complies with all rules of statutory construction. It considers the needs of the Government and the situation which the statute was intended to meet. It considers the condition of the law with regard to such matters then in existence, and last, but perhaps



most important, it gives a full, clear, and consistent meaning to every portion of the Act without any duplications, inconsistencies, or ambiguities. With these things clearly in mind, the intent of the order, as well as of the parties issuing the same, and, it is believed it may be said, of the parties accepting it, becomes clear and shows that the transaction was not a requisition but was a contract. Full meaning is given to the word "obligatory" used in both the statute and the order in the same sense and with the same meaning.

The other provisions of the order confirm the conclusion that it was a contract. After an enumeration of the products desired it is stated that (R. 31)—

The Navy does not guarantee *to purchase* the above-stated quantities and reserves the right to increase or decrease these quantities in conformity with the requirements of the Navy during the above-stated period. (Italics ours.)

Here the Government stated that it did not agree to buy all of the products enumerated but reserved the right to increase or decrease the amount thereof.

Here the express words of purchase are used. If it was a requisition of the quantity stated, the Government would have then and there become the owner thereof, with no right to decrease its interests in the property taken or its obligations because thereof, and at the same time with no rights to in-

crease the amounts without new takings or requisitions.

The order also provides that any portion of the Navy's requirements—

will be furnished Tax Paid or In Bond, as directed by the Officer in Charge. (R. 31, 32.)

Had it been a requisition the property would have been taken "as is" without any power or authority to require the petitioner to do additional things.

The order also provided for "inspection at the point of delivery." (R. 32.) How could the Government, had it requisitioned the property, thereafter inspect and reject the same? As above stated, had it requisitioned it the Government would have taken the property "as is." But the order further provided that the articles furnished or services performed under the same must conform in all respects to the requirements and specifications indicated thereon (R. 34), and that the materials delivered or services performed should be subject to inspection and examination by officers of the Navy—

and will not be accepted unless conforming in all respects to the requirements of the specifications (R. 35).

All of these provisions are clearly inconsistent with any idea of a requisition. No inspection would have been necessary, no rejection would have been

possible. The title would have already passed to the United States and the property would have been taken in its then existing condition. Further than that, when the order was received it was accepted in writing by the petitioner and the deliveries were made by the petitioner in accordance with the terms thereof. If the order had been a requisition, no acceptance was necessary. See *American Smelting and Refining Co. v. United States*, 259 U. S. 75.

When the needs of the Navy were filled, the contract was cancelled and no further orders or deliveries were made after that. (R. 38, 39.) If the transaction had been a requisition the title would already have passed. The Government would have been then the owner of the property and there would have been no right by the Government to cancel.

The Act of March 4, 1917, provided that if the owner of property requisitioned was dissatisfied with the price fixed he should receive 50 per cent of the price so fixed and sue for the balance. The Act of June 15, 1917, provided that he should receive 75 per cent of the amount so fixed, and sue for the balance. In this case the petitioner billed at neither 50 per cent or 75 per cent, but billed at a sum in excess of the price tentatively fixed. It received and kept, with no offer to return, the full amount of the price tentatively fixed by the Government. This shows that neither party considered that they were proceeding with a requisition under the Act, but, on the contrary, they be-

lieved they were proceeding strictly in accordance with the terms of the contract which they had made. Had the Government believed it was a requisition under the statute it would have had no right or power to offer more than the fixed percentages except upon acceptance in full payment by petitioner. Had petitioner believed it was such a requisition it would have had no right to demand or receive more than the fixed percentages.

From the above discussion, it is submitted that the order shows upon its face that the transaction here involved is a contract. The facts found by the Court of Claims show that the parties believed they were making a contract and acted in accordance therewith, and not with any idea of proceeding under a requisition of the property by the Government.

*The order was for products not in existence*

We have heretofore discussed to some extent this proposition, but it is believed it is of such importance that it should be enlarged upon as a separate point. As heretofore set out, proceedings in condemnation and proceedings to requisition and commandeer property are proceedings *in rem*. There must be a *res* upon which the same can operate. That *res* must be in existence. We are unable to conceive what branch of the Government would have authority to issue an order requiring any person or corporation to operate its plant and produce

goods. What power or force is there in the Government to compel a performance of such an order? What are the mechanics by which it could be accomplished? If such a power existed, how could it be successfully carried out? On the other hand, the whole theory of the exercise of the power of eminent domain by the Government is that the Government has need for an existing thing, whether it be a piece of real estate or personal property. The Government then and there determines to exercise its power to take that thing in existence, and when the power is exercised the article in the condition in which it then exists becomes the property of the Government. There is no power in the Government to requisition articles not in existence, and Congress would not undertake to authorize the President to exercise such power. The discussion heretofore given of this Act clearly shows that Congress had in mind the foregoing well-settled rules concerning these matters; that it intended to authorize the President to issue an order to acquire the products it needed by contract and then, if compliance was refused, to exercise its power of eminent domain upon an existing object by taking the plant and letting the Government manufacture the articles for itself. This clearly shows that the transaction here involved was not and could not have been a requisition.

*The order was not signed by the President or the  
Secretary of the Navy*

The Act of March 4, 1917, provided that the President should exercise the powers therein given. The Act of June 15, 1917, gave its powers to the President, but provided that the President might exercise the power and authority thereby vested in him through such agency or agencies as he should from time to time determine. By an Executive order dated August 21, 1917 (which is set out in the Appendix hereto), the President undertook to delegate the powers conferred upon him by the Act of June 15, 1917, to the Secretary of the Navy. For the reasons hereinafter set forth he could not have delegated by this Executive order the powers conferred by the Act of March 4, 1917, because the Act gave him no such right of delegation.

Of course, it is well recognized that there are certain powers which require the personal discretion of the officer to whom they are given that can not be delegated. Judicial powers are of this character. (*Runkle v. United States*, 122 U. S. 543, 557.) The determination of just compensation under the Constitution is of a judicial character; the determination of whether property is to be taken under the power of eminent domain has been held to be of a judicial character. (*Ontario Knitting Co. v. State of New York*, 205 N. Y. 409, 415, 416; affirmed 147 App. Div. 316.) But even if the

power of determination as to what property should be subjected to requisition is not of a judicial character, it certainly is not a ministerial duty, but is a thing which requires the exercise of the utmost discretion. The power to take a man's property for public use is a very sacred and extreme proceeding, and the exercise of that power is a very delicate matter. It should only be exercised in cases of great necessity and after mature consideration by an officer of high standing and unusual judgment. Congress therefore permitted the exercise of this power only by the President or by such officer or agency as he might designate. He did designate for this purpose the Secretary of the Navy. The Secretary of the Navy did not sign the order. It was signed by the Paymaster General of the Navy. While it is no doubt true that the Paymaster General of the Navy may have been a man of exceptional ability and judgment, he was not designated by the President to exercise this authority, and the Secretary of the Navy, whom the President had designated, had no authority to delegate such power to another. If such power existed it could be delegated *ad infinitum*, until the office boy would be taking the private property of American citizens for public use under the unusual power of eminent domain.

On the other hand, it is clear that the Paymaster General did have authority to enter into contracts. He exercises such power in many instances. This

further goes to show that the transaction herein involved must have been a contract, and not a requisition. If it was not a contract it was nothing at all. It was but a mere unauthorized act of a Government officer, a tort, of which the Court of Claims has no jurisdiction, and the parties could recover in this case, if at all, only upon the theory of an implied contract by waiving the tort.

#### WHAT WERE THE TERMS OF THE CONTRACT?

Having shown that the transaction must be a contract, let us ascertain its terms. The contract was that the petitioner should manufacture the articles specified in the contract with such increases or decreases as the contract permitted and that the Government would pay a reasonable price therefor. In order that the petitioner might be paid something approximating the reasonable price, a tentative price was fixed, at which rate it was agreed the Government would make payments on account, the whole matter to be subject to readjustment when the final reasonable price was determined. The cause of action accrued when the property was delivered. The money was due then. The obligation and agreement of the Government was to pay the then reasonable price or market value of the goods. The court has determined what that price was and has allowed a recovery of a sum sufficient to equal that price. The petitioner was entitled to no more. There was no agreement to pay interest; the contract did not expressly stipulate for its payment,



and in the absence thereof Section 177 of the Judicial Code forbids any such payment. That section is as follows:

No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

But let us assume (which we do not concede) that the contract was to pay just compensation. Even so, the result would be the same. The just compensation is to be determined as of the time the property was delivered. The cause of action then accrued and any claim which the petitioner had on account thereof arose at that time. Section 177 prohibiting interest is equally applicable.

Assuming that the just compensation provided for by the contract was the same as the just compensation of the statute, it still did not allow the payment of interest. In all the cases in which a contract has been implied upon the taking of property by the Government for public use because of the constitutional provision concerning just compensation the obligation to pay just compensation is of the same character, the same extent, and the same force as that which would exist if this contract is to be construed as one to pay just compensation. The contention has been made in those cases that interest should be allowed, and the contention has also been made that while interest as such may not be allowed in these implied contracts

that still a sum measured by interest should be allowed as part of the just compensation provided for in the contract. This contention was squarely met by the Court in the case of *United States v. North American Transportation & Trading Company*, 253 U. S. 330, 335, and it was there held that in view of the prohibitions imposed by Section 177 of the Judicial Code, which was but an incorporation into the statute of the existing principles of common law against the allowance of interest in any form against a sovereign government for delay in payment in the absence of a contract expressly stipulating for its payment, such interest could not be allowed.

Certainly this contract did not expressly stipulate for the payment of interest, and the most that can be said of it (and we do not consider that it is correct) is that there was an implied promise to pay interest. It is impossible for such an implication to arise in view of the statute. Even if it arose such an implied promise would have no effect, as the statute prohibits the payment of any interest in the absence of an express (not implied) stipulation for its payment.

#### THE CONTENTION THAT THE CASE ARISES UNDER THE CONSTITUTION OR THE LAWS OF CONGRESS

This contention is advanced by inference if not directly in the brief filed in this case by *amici curia*. This contention is not new. The conten-

tion that in situations where private property was taken for public use a cause of action arose under the Constitution or laws of Congress was first advanced in the case of *Schillinger v. United States*, 155 U. S. 163. It was there overruled, although a dissenting opinion by Justices Harlan and Shiras indicated their concurrence with such contention. The question next appeared in the case of *United States v. Lynah*, 188 U. S. 445. The majority opinion of the Court rejected the contention. The concurring opinion by Justices Brown, Shiras, and Peckham concurred in the contention; but in the much later case of *Basso v. United States*, 239 U. S. 602, the contention was finally disposed of, and the rule announced in the *Schillinger* case was followed. This Court again, in the case of *United States v. Holland-American Line*, 254 U. S. 148, refused to overrule the *Schillinger* case, but followed the same. See also *United States v. North American Transportation & Trading Co.*, 253 U. S. 330, 335.)

Again let us assume (without conceding) that it is a case which arose under the Constitution or under the laws of Congress. We still maintain that the Constitution and the applicable law of Congress can be construed to be no more than a promise to pay just compensation, and that under the decisions of this Court in the *North American Transportation & Trading Company* case that must be con-

strued to be the market value at the time of taking, without any additions of interest or additions of any sum measured by interest. The case of *Seaboard Air Line Railway Co. v. United States*, 261 U. S. 299, and *Brooks-Scanlon Corporation v. United States*, 265 U. S. 106, are not at all inconsistent with this theory. Those cases were based upon a special jurisdiction of the courts involved—in the *Seaboard case* the District Court under the Lever Act, in the *Brooks-Scanlon case* under the Act of June 15, 1917. They were clearly requisitions of property, and did not rest to any extent upon a contract. Interest was not allowed as such in those cases, but merely a part of the just compensation which was provided. This Court held that the statute contemplated a kind of condemnation proceeding operated in a sort of reversed order from that in which condemnation proceedings usually are conducted, namely, that instead of paying and then taking the property, the property was taken and the Government then paid. In view of that situation the statute when it authorized just compensation authorized that compensation as of the time that the payment was made. The *North American Trading and Transportation case* contemplated the possibility of such a situation as that and in the opinion this Court expressly stated that in such case, if it arise, such a sum equal to interest might be allowed. (See *North American, etc., case*, 253 U. S. 330 at 337.)

**CONCLUSION**

For the reasons heretofore set out, it is respectfully submitted that the conclusion of the Court of Claims is correct and should be affirmed.

Respectfully submitted.

✓ WILLIAM D. MITCHELL,  
*Solicitor General.*

✓ HERMAN J. GALLOWAY,  
*Assistant Attorney General.*

FEBRUARY, 1927.

#### NOTE

The situation in this case makes it desirable to present to the Court every argument which may be adduced in support of the opinion of the Court of Claims, and I have subscribed the above brief for that purpose. It does not state my views of the law. This case, in my judgment, discloses a requisition of property under the power of eminent domain.

The Acts of March 4, 1917, and June 15, 1917, authorized the President to requisition property under the power of eminent domain. The Navy Department order cited and referred to those statutes and stated that the action of the President was pursuant to them, that the order was obligatory, and that it must be filled. If the Tobacco Company had not "accepted" the order in the sense of indicating its willingness to yield to it, its plant would have been seized and the tobacco taken by force. There was a declaration by the United States that it was taking the property under the power of eminent domain and that it would take it whether the Tobacco Company was willing or not, and the act of the company in yielding to this superior force, to the extent of handing over its property in obedience to the order, standing at the same time on its right to just compensation, did not

change the nature of the transaction. By "accepting" the order and refusing the price later offered, and standing on its right to just compensation, the company did nothing more than notify the Government that it need not send agents to take the tobacco by force.

This case is distinguishable from *American Smelting and Refining Co. v. United States*, 259 U. S. 75, because here the property owner did "save the question of price."

It should not be necessary for a citizen, in order to save his right to just compensation under the Constitution, to require the Government to proceed to take his property by physical force. The result of the decision below is that it is to the interest of the citizen not to yield to such an obligatory order to the extent of delivering property under it, but to require the Government to take his property by physical force. It is not in the interest of the United States to establish such a rule. In time of war its interests are served by obtaining requisitioned property with the least trouble.

The clauses in the order, which read as if a contract was contemplated, may be accounted for by the fact that it was contemplated the transaction might become a contract if an offered price was accepted as satisfactory.

With respect to the matter of authority to requisition, dealt with in the opinion of the Court of

Claims (R. 45), the obligatory order recited that it was issued pursuant to the statutes referred to "under the direction of the President of the United States" (R. 29), and that the Paymaster General had signed it "by direction of the Secretary of the Navy." (R. 12.) In the absence of anything to the contrary, this discloses sufficient authority from the President and the Secretary.

With respect to the point that the goods taken were not in existence when the order was issued, but were later manufactured, the transaction may be considered as a requisition of the output or as a continuing requisition of the manufactured product as and when produced. *Omnia Commercial Co., Inc., v. United States*, 261 U. S. 502.

Even if the transaction be considered a contract, it may be taken as a contract to pay just compensation in the constitutional sense. If the express promise was to pay just compensation, in the sense of the Fifth Amendment, as defined in *Seaboard Air Line Ry. Co. v. United States*, *supra*, it was an express contract to pay the full equivalent of the value at the time of taking, paid contemporaneously with the taking, which is equivalent to an express promise to add to the value at the date of taking, a sum measured by interest on that value from the date of taking to the date of payment, and in that case there is not much left of Section 177 of the Judicial Code as applied to this case.



If this transaction was a requisition and not a contract, the Court of Claims had jurisdiction to render judgment for just compensation in the constitutional sense, because the applicable statute conferred jurisdiction on that court to award just compensation.

✓ WILLIAM D. MITCHELL,  
*Solicitor General*

FEBRUARY, 1927.

## APPENDIX

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The pertinent portions of the Act of March 4, 1917 (Chap. 180, 39 Stat. 1168, 1193), provide:

(b) That in time of war, or of national emergency, \* \* \* the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First, Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take im-

mediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

\* \* \* \* \*

Third. To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and, within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

That all authority granted to the President in this paragraph, to be exercised in time of national emergency, shall cease on March first, nineteen hundred and eighteen.

(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions

of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The pertinent provisions of the Act of June 15, 1917 (Chap. 29, 40 Stat. 182, 183), provide that:

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

\* \* \* \* \*

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such out-

put or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) \* \* \* \* \*

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, ac-

quire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time \* \* \*

## EXECUTIVE ORDER

By virtue of authority vested in me in the section entitled " Naval Emergency Fund " of an Act of Congress entitled " An Act Making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes," approved March 4, 1917, and in the section entitled " Emergency Shipping Fund " of an Act of Congress entitled " An Act Making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the Secretary of the Navy shall have and exercise all power and authority vested in me in said sections of said acts, in so far as applicable to and in furtherance of the construction of vessels for the use of the Navy and of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for construction of vessels for the Navy and of war materials, equipment and munitions required for the use of the Navy, and the more economical and expeditious delivery thereof.

The powers herein delegated to the Secretary of the Navy may, in his discretion, be exercised directly by him, or through any other officer or officers who, acting under his direction, have authority to make contracts on behalf of the Government.

WOODROW WILSON.

THE WHITE HOUSE,  
*21 August, 1917.*

